

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH BONGIOVANNI,

Defendant.

Case No. 1:19-cr-227  
(LJV)

February 20, 2024

TRANSCRIPT EXCERPT - EXAMINATION OF THOMAS HERBST  
BEFORE THE HONORABLE LAWRENCE J. VILARDO  
UNITED STATES DISTRICT JUDGE

**APPEARANCES:**

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And

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**PRESENT:**

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\* \* \* \* \*

(Excerpt commenced at 9:58 a.m.)

(Jury present.)

**THE COURT:** Okay, are you ready to call your next  
witness?

**MR. COOPER:** Finally, Judge --

**THE COURT:** Oh, I'm sorry.

**MR. COOPER:** -- I am finally ready to call my next  
witness.

**THE COURT:** Oh, I thought there was another one.

**MR. COOPER:** There's not, Judge.

Special Agent Thomas Herbst.

**T H O M A S H E R B S T**, having been duly called and sworn,  
testified as follows:

**MR. COOPER:** May I inquire?

**THE COURT:** You may.

DIRECT EXAMINATION BY MR. COOPER:

Q. Good morning, sir, how are you?

A. Good sir, thank you.

Q. Will you please introduce yourself to our jury?

A. My name is Thomas Herbst, H-E-R-B-S-T. I live in Florida. And I previously worked for the FBI.

Q. Where did you grow up, Mr. Herbst?

A. I -- I was born in the City of Buffalo, I was raised in South Buffalo. Graduated from Bishop Timon High School 50 years ago. Graduated from the University of Buffalo four years after that. Graduated from law school three years after that. And eventually, applied for and was accepted into the FBI as a special agent.

Q. What sort of work did you do when you first graduated from law school?

A. I was a lawyer in Buffalo, New York.

Q. And you mentioned that eventually you applied for a position with the FBI?

A. I did.

Q. Okay. Had this been a goal of yours for some time?

A. Yes, it was.

Q. When did you apply to become a FBI Special Agent approximately?

A. I started working as a special agent in June of 1986, so it probably would have been early 1985.

1 Q. Can you describe for the jury what sorts of training you  
2 undergo to become a special agent with the FBI?

3 A. Starting with -- you don't want the background process,  
4 you just want the --

5 Q. The training once you've made it through the background.

6 A. All right. So after you're accepted as an FBI Special  
7 Agent, you're -- you go to the FBI Academy, which is in  
8 Quantico, Virginia. It's located on a Marine Corps base off  
9 Interstate 95 approximately an hour south of Washington, D.C.

10 Q. What sorts of training do you undergo at Quantico.

11 A. All right. I would say that the training is about three  
12 parts, they're not three equal parts. The biggest part would  
13 be academics. The second part would be physical fitness  
14 training and defensive tactics, to include like tactics of  
15 arrest. And the last part would be the firearms training.

16 Q. And did you ultimately graduate from Quantico, Virginia?

17 A. I did.

18 Q. Okay. While you're at this FBI Academy in Quantico, do  
19 you receive training in how to conduct investigations?

20 A. Yes, you do. The academic portion, which is the largest  
21 part of the FBI training, it's heavily weighted on the law,  
22 legal procedure, substantive statutes like white collar  
23 statutes. And then you kind of get a block of training in  
24 everything you might be exposed to, counterintelligence,  
25 counterterrorism -- which I never worked, well, we all worked

1 counterterrorism after 9/11. But, and then, you know, any  
2 substance area of the law that you might come across in your  
3 FBI career, you're introduced to that, and you receive a  
4 block of training on that.

5 Q. And then after you graduate from the FBI Academy at  
6 Quantico, do you continue to undergo kind of on-the-job  
7 training as a new agent?

8 A. Well, you're assigned a training agent that's -- you have  
9 a supervisor, obviously, but you're assigned a training agent  
10 that kind of directs you on how to conduct investigations.

11 Q. Where did you go first after you graduated from the  
12 FBI --

13 A. I was --

14 Q. -- Academy?

15 A. -- assigned to the FBI's Tampa division, but I was  
16 physically located in the Orlando RA. It's -- RA's for  
17 resident agency.

18 Q. What sorts of cases did you investigate as a special  
19 agent in Orlando, Florida?

20 A. Well, again, I was assigned to the Tampa division, but  
21 this is kind of important, because the Orlando RA, so most of  
22 the resources would be in Tampa, so the Orlando office would  
23 be a much smaller office personnel-wise than the Tampa  
24 office. So at that time we only had ten criminal agents in  
25 the Orlando office, and Orlando was obviously a large -- very

1 large metropolitan area. So we kind of worked everything.

2 But primarily, initially I worked violent crimes, which would

3 be bank robberies, we had quite a few bank robberies down

4 there at the time, probably still do. I worked a lot of

5 fugitives back then. But really, anything that was a federal

6 violation that the FBI would investigate it, I would have

7 investigated at that time.

8 And then eventually I transitioned to working more white

9 collar crimes, which would have been bank fraud and -- and --

10 and general fraud type statutes, you know, people, like,

11 con-men, that kind of fraud.

12 Q. How long were you in that Orlando office for?

13 A. Four years. From October of 1986 until October of 1990.

14 Q. Where did you go next during your career?

15 A. I was transferred to Washington, D.C. And I spent the

16 next 17 years working in the Washington field office in

17 Washington, D.C.

18 Q. During your 17 years in the Washington field office, did

19 you specialize in any type of investigation, or did you work

20 again all sorts of different cases?

21 A. No, the Washington field office is the second largest FBI

22 office in the country. New York is the largest. So it's a

23 very specialized.

24 So, yes, I was -- I specialized in the Washington field

25 office.

10:05AM 1 Q. What sorts of cases did you specialize in in the --

10:05AM 2 A. Well, when I --

10:05AM 3 Q. -- Washington --

10:05AM 4 A. -- when I --

10:05AM 5 Q. -- field -- so just, Special Agent Herbst, when I'm

10:05AM 6 asking you a question, if you could wait until I finish

10:05AM 7 speaking and then answer, that way Ann can type everything

10:05AM 8 down, okay?

10:05AM 9 A. Yep. I'm sorry.

10:05AM 10 Q. That's okay. Thank you. So I'll ask the question again.

10:05AM 11 What sorts of cases did you specialize in in that

10:05AM 12 Washington, D.C. field office?

10:05AM 13 A. Initially when I got there for a short period of time I

10:05AM 14 was assigned to -- and they did this with a lot of new agents

10:05AM 15 in the office so they can be familiar with the area -- I was

10:05AM 16 assigned to an applicant squad. So we did background

10:05AM 17 investigations for Department of Justice employees.

10:05AM 18 Then I was asked to go over to work on an independent

10:05AM 19 counsel investigation. Back then, there was an independent

10:05AM 20 counsel statute. The Court actually would appoint an

10:06AM 21 independent counsel, and he would hire his own staff. So

10:06AM 22 independent counsels were appointed when there was a

10:06AM 23 possibility of a conflict with the Department of Justice, so

10:06AM 24 they basically created a whole independent prosecutorial

10:06AM 25 staff. So I spent three years working -- probably about

10:06AM 1 three years working a major public corruption investigation.

10:06AM 2 Q. After you finished your 17 years in the Washington, D.C.

10:06AM 3 office what was your next assignment?

10:06AM 4 A. I was transferred back to Buffalo, New York, in late

10:06AM 5 2007, around Thanksgiving of 2007.

10:06AM 6 Q. What brought you back to the Buffalo area?

10:06AM 7 A. A family matter.

10:06AM 8 Q. What was your first assignment in the Buffalo office?

10:06AM 9 A. When I first got to Buffalo, I was assigned to the intel

10:06AM 10 squad for a very short period of time. And then the ASAC

10:06AM 11 approached me, and I had a choice to work white collar or

10:07AM 12 violent crimes, and I chose to work violent crimes at that

10:07AM 13 time.

10:07AM 14 Q. Are you familiar with the phrase Safe Streets Task Force?

10:07AM 15 A. Yes, I was assigned to Squad 4 in the FBI office here in

10:07AM 16 Buffalo. Post 9/11, smaller offices like Buffalo basically

10:07AM 17 had a white collar squad and a squad that did everything

10:07AM 18 else. So I was assigned to Squad 4, which is everything

10:07AM 19 else. But the largest component of Squad 4 was the FBI's

10:07AM 20 Safe Streets Task Force, which was an FBI initiative that

10:07AM 21 started probably in the early 1990s to combat violent street

10:07AM 22 gangs.

10:07AM 23 Q. Was your work in Squad 4 solely limited to that violent

10:07AM 24 gang activity?

10:07AM 25 A. No, it would have been -- this is an over -- this is an



1 oversimplification, but we kind of worked everything other  
2 than white collar crimes.

3 Q. During the time that you were a member of Squad 4 in the  
4 FBI here in Buffalo, did you begin working on a project to  
5 attempt to solve cold case homicides?

6 A. Yes, I did. I opened a case into organized crime that  
7 primarily focused on old unsolved LCN organized crime  
8 homicides in the City of Buffalo. And I worked that in  
9 conjunction with the Buffalo Police Department Cold Case  
10 Squad.

11 **MR. COOPER:** Judge, may I just have one moment?

12 **THE COURT:** Sure.

13 **MR. COOPER:** Judge, may we approach with the parties  
14 briefly, just to get a clarification from the Court on a  
15 ruling?

16 **THE COURT:** Sure.

17 **MR. COOPER:** Thank you.

18 (Sidebar discussion held on the record.)

19 **MR. COOPER:** I want to make sure that we abide by the  
20 Court's ruling on this IOC.

21 **THE COURT:** Yeah.

22 **MR. COOPER:** And I want to refresher from you.

23 **THE COURT:** Yeah.

24 **MR. COOPER:** LCN is fair game. But to have him  
25 define what that term --

1           **THE COURT:** Why don't you tell him that when you're  
2 referring to IOC or Italian Organized Crime, ask him to use  
3 that. If he slips up, obviously, he's not -- there's nothing  
4 we can do about it.

5           **MR. COOPER:** Okay.

6           **THE COURT:** The phrasing he's used to using, I'm sure  
7 he's not going anything intentionally.

8           **MR. COOPER:** Perfect.

9           **THE COURT:** Why don't you tell him, you know, just so  
10 you understand, we're using the term Italian Organized Crime,  
11 IOC, to refer to that.

12           **MR. COOPER:** Okay.

13           **THE COURT:** And so would you please use that, too.  
14 Something along those lines.

15           **MR. COOPER:** Understood.

16           **THE COURT:** Any problem with that?

17           **MR. SINGER:** No, that's fine, Judge.

18           **MR. COOPER:** Thanks. I just want to make sure that  
19 everybody --

20           **THE COURT:** And -- and I knew exactly why you called  
21 that time out --

22           **MR. COOPER:** Yep.

23           **THE COURT:** -- and I appreciate it. But you haven't  
24 done anything to not abide by it, and neither has the witness.

25           **MR. COOPER:** Got it. Thank you, Judge.

10:10AM 1 (End of sidebar discussion.)

10:10AM 2 **BY MR. COOPER:**

10:10AM 3 Q. Special Agent Herbst, a moment ago you used the term  
10:10AM 4 "LCN." Would that be a term that's synonymous with Italian  
10:10AM 5 Organized Crime?

10:10AM 6 A. Yes, it is.

10:10AM 7 Q. Okay. And so what I'm going to ask you to do is during  
10:10AM 8 the remainder of your testimony, if you're going to make  
10:10AM 9 reference to that, just use the phrase Italian Organized  
10:10AM 10 Crime; is that okay?

10:10AM 11 A. That's fine.

10:10AM 12 Q. Okay. Thank you.

10:10AM 13 So you told us a moment ago that while you were with  
10:10AM 14 Squad 4, you began working to attempt to solve cold case  
10:10AM 15 homicides relating to Italian Organized Crime; is that  
10:10AM 16 correct?

10:10AM 17 A. That's correct.

10:10AM 18 Q. As a part of that investigation, did you want to develop  
10:10AM 19 an informant or a cooperator into Italian Organized Crime?

10:10AM 20 A. Yes. There's many different ways to investigate cases.  
10:10AM 21 But in a case like that, you really ultimately are gonna need  
10:10AM 22 an insider to -- or, multiple insiders to kind of direct you  
10:11AM 23 and ultimately solve the case.

10:11AM 24 Q. Okay. Did you -- are there steps that you take to  
10:11AM 25 attempt to identify a person who may be a valuable informant

1 in an investigation like that?

2 A. Well, in this case, we were -- we went out and started  
3 doing interviews. But, you know, as you're doing interviews,  
4 you're developing information. And as you're developing  
5 information, you get a -- a -- an indication of who might be  
6 a person that was well placed to provide information of  
7 value.

8 And I always had a -- because it was a cold case homicide  
9 investigation, and some of these homicides went back quite a  
10 long way, I always had, in my own mind, and there's different  
11 ways to investigate cases, that I -- and because this is an  
12 organization that has gone on historically for a very long  
13 time, I always felt that there would be younger people that  
14 were part of this organization that may be -- would have  
15 information that would help me in my investigation.

16 Q. Did you try focus in on a younger person, as you  
17 described, who may have access to individuals in Italian  
18 Organized Crime?

19 A. I don't know that I focused on any one individual, but at  
20 some point I became aware of Peter Gerace.

21 Q. Okay. Did Peter Gerace come up during the course of your  
22 investigation?

23 A. Well, I became aware that Mr. Gerace was involved in  
24 narcotics trafficking, and I was aware of his familial  
25 relationship to Italian Organized Crime.

1 Q. What was that familial relationship that you were aware  
2 of?

3 A. Mr. Gerace's grandfather was Joseph Todaro Jr., and he  
4 was a longtime boss of the Italian Organized Crime family.

5 And the -- his uncle would have been the -- Joe  
6 Todaro Jr. would have been the longtime underboss of the  
7 Italian Organized Crime family.

8 Q. I think a moment ago you said Joe Todaro Jr. was his  
9 grandfather. Would that be Joe Todaro Sr.?

10 A. Joe Todaro Sr. was the grandfather. Joe Todaro Jr. was  
11 the underboss that would have been his uncle.

12 Q. Understood. In your mind -- in your mind, at that time,  
13 did Peter Gerace constitute a person who may have had access  
14 to Italian Organized Crime in a way that could further your  
15 investigation?

16 A. He did.

17 Q. What did you do as a result of that?

18 A. At some point, I became aware that Mr. Gerace was on  
19 federal probation. And I think that was actually in a --  
20 conjunction with -- there was another person that actually  
21 was a subject of my investigation that was on federal  
22 probation at the time.

23 So, sometime back 15 years ago, whatever that was, I  
24 contacted the probation officer and -- about the subject of  
25 my LCN case -- or, Italian Organized Crime case. And some --

1 during the course of those discussions, I became aware that  
2 Mr. Gerace was also on federal probation.

3 Q. So while pursuing another subject, you became aware that  
4 Peter Gerace was on federal probation; is that --

5 A. Yes.

6 Q. -- what you're saying?

7 A. Yes, that's correct.

8 Q. And can you help the jury understand, what time frame are  
9 we at? What year was this going on?

10 A. 2009.

11 Q. Okay. Did there come a time when you spoke with somebody  
12 who worked at federal probation regarding Peter Gerace?

13 A. Yes. I spoke to Peter Lepiane, who was his supervising  
14 probation officer. And I may have -- I probably did review  
15 the file, but I certainly spoke to Peter. And I just  
16 remember that a lot of the information that Mr. Gerace had  
17 provided to Mr. Lepiane was incorrect or inconsistent with  
18 information that I had.

19 Q. Can you tell the jury what you mean by that? What  
20 information was it that Lepiane had received from Gerace that  
21 was inconsistent with your --

22 A. Well, I --

23 Q. -- investigation?

24 A. -- remember specifically that Mr. Gerace had reported  
25 that he was working at his mother's restaurant at the time.

1 And I knew that he in fact had -- was operating Pharaoh's  
2 Gentlemen's Club in Cheektowaga. I think he reported a  
3 residential address, which may have been correct, but I also  
4 knew that he had an apartment at Pharaoh's, so I knew he was  
5 spending time there, too.

6 So I think the primary thing was there was -- probation  
7 did not know of any connection between Mr. Gerace and  
8 Pharaoh's.

9 Q. Did you share the information that you had with Peter  
10 Lepiane?

11 A. I did.

12 Q. As a result of that meeting where you shared information,  
13 did you begin to work in concert with U.S. Probation?

14 A. I did.

15 Q. Did there come a time during your work with  
16 U.S. Probation when you took a significant investigative step  
17 along with them?

18 A. Yes. This is probably a couple months between my initial  
19 consultation with Mr. Lepiane, and working with Mr. Lepiane  
20 and his supervisors. I remember having meetings at the  
21 probation office. They decided to do a search of Pharaoh's  
22 based on information they had, and information that I had  
23 provided.

24 Q. Do you remember when that search occurred?

25 A. I do remember that it was October 31st, because it was

1 Halloween. And I do remember specifically that the probation  
2 office, when we were deciding when to do the search, they  
3 wanted to time it for Halloween because they thought there  
4 might be -- a search was done early morning, but they were  
5 thinking there might be a Halloween party that night, and it  
6 might be more fruitful to do a search on that day. So I  
7 remember it was October 31st. I remember it was a Saturday.

8 And now I recall that it was 2009.

9 Q. Were you personally present for that search?

10 A. I was.

11 Q. Did you have a partner at the time?

12 A. My primary partner was Detective Robert Cottrell. Bob  
13 was a detective at the Amherst, New York, Police Department.  
14 And Bob was assigned as a task force officer to the FBI Safe  
15 Streets Task Force.

16 Q. Was Bob present with you on October 31st for the search  
17 at Pharaoh's?

18 A. He was. Most of the personnel at the search were from  
19 the probation officer. I was there from the FBI.

20 Initially, Bob was sitting on Mr. Gerace's house, which  
21 was out in Tonawanda. So if, by chance, he was at the house  
22 rather than at the -- Pharaoh's. And, so, after we made  
23 entry, Bob came from Tonawanda to Pharaoh's.

24 Q. And just to explain the phrase that you used, when you  
25 say "sitting on a house," can you just describe for the jury,



10:18AM 1 he's not physically sitting on top --

10:18AM 2 A. No, he --

10:18AM 3 Q. -- of the roof --

10:18AM 4 A. -- he's doing --

10:18AM 5 Q. -- right?

10:18AM 6 A. -- a one-man covert surveillance just in the proximity of

10:18AM 7 Mr. Gerace's house just to see if he was there, rather than

10:18AM 8 where we were.

10:18AM 9 Q. Okay. And who was the primary agency leading that search

10:18AM 10 at Pharaoh's?

10:18AM 11 A. Probation.

10:18AM 12 Q. What was your purpose in participating in that search?

10:18AM 13 A. Well, I had provided information to them that was

10:18AM 14 fruitful for them obtaining a warrant. But my primary

10:18AM 15 purpose was I wanted an opportunity to speak to Mr. Gerace

10:18AM 16 and try to develop a rapport with him.

10:18AM 17 Q. Can you describe for the jury how the search played out?

10:18AM 18 What happened when you got inside?

10:19AM 19 A. I knew it took a long time to execute the search, because

10:19AM 20 they have a requirement where they have to physically see the

10:19AM 21 individual.

10:19AM 22 When we got inside, Mr. Gerace was in his office in

10:19AM 23 handcuffs.

10:19AM 24 I approached the supervisory probation officer, I think

10:19AM 25 his name was Brian Burns. And I told Brian that I would --

1 somebody had to sit with Mr. Gerace during the course of the  
2 search, so I told him that I would sit with Mr. Gerace so I  
3 would have an opportunity to talk to him.

4 So I -- I sat with him. And then if -- whenever Bob  
5 showed up, Bob also came in.

6 Q. Okay. Just to clarify, you just said the name Brian  
7 Burns as a supervisory probation officer. That's not the  
8 same Brian Burns that works for the FBI --

9 A. No, I --

10 Q. -- on this case --

11 A. -- know that --

12 Q. -- right?

13 A. -- Brian Burns, but there -- I -- I -- I think I have the  
14 name correct, I think there's two Brian Burns.

15 Q. Okay. But we're talking about different people --

16 A. Yeah.

17 Q. -- right?

18 A. Yeah, we're talking about a supervisory at probation.

19 Q. Okay. On October 31st, 2009, while you're inside  
20 Pharaoh's, the search is being conducted, what's your goal?

21 A. Well, again, the -- I had the case into Italian Organized  
22 Crime unsolved homicides, so my goal was to develop a  
23 cooperator or cooperators into that investigation. So my  
24 goal at that time was to, you know, introduce myself to  
25 Mr. Gerace, and to develop a relationship with him.

1 Now, I didn't expect that Mr. Gerace was going to just  
2 pour out everything he knew. But, you know, there's a whole  
3 process, and we've all gone through that in life in  
4 developing a relationship, it's always basically just trying  
5 to have a conversation with him and develop a rapport.

6 Q. Did you have a conversation with him?

7 A. Yeah, I did.

8 Q. Describe for the jury how that conversation went.

9 A. Well, again, when we got in there, he was in custody.

10 And he was a little down at first. But he -- he picked up  
11 pretty quick. And we had a very pleasant conversation for  
12 the duration of the search.

13 Q. Did --

14 A. It wasn't -- it wasn't substantive in any way. But it  
15 was just -- a lot of the conversation was based on, you know,  
16 we were in Mr. Gerace's office, so there was documents on his  
17 desk, and I would pick up a document, I would say -- ask him  
18 questions about that. You know. But we had a very, you  
19 know, pleasant conversation.

20 Q. You said it was pleasant but not substantive. What did  
21 you mean when you said it was not substantive?

22 A. Well, substantive in that I -- he -- he wasn't providing  
23 information on a case.

24 Q. Did Peter Gerace tell you during that conversation that  
25 he knew about kilo-level cocaine traffickers?

10:21AM 1 A. No.

10:21AM 2 Q. Would that have stuck out in your memory if he would have  
10:21AM 3 said that to you?

10:21AM 4 A. I would have recalled that, yes.

10:21AM 5 Q. After that pleasant but not substantive conversation with  
10:21AM 6 Peter Gerace, can you describe for the grand jury what  
10:22AM 7 happened, after the search is over, what's the next time you  
10:22AM 8 hear about Peter Gerace?

10:22AM 9 A. So that was a Saturday. So, shortly after that, my  
10:22AM 10 supervisor at the time was James Jancewicz. So, Jim, or  
10:22AM 11 Jimmy as we called him, Jim received a call from Dale  
10:22AM 12 Kasprzyk from the DEA expressing that DEA had an interest,  
10:22AM 13 and I'm paraphrasing, I wasn't -- I wasn't a party to Jim and  
10:22AM 14 Dale's phone call, but Jim approached me after that phone  
10:22AM 15 call, but the indication was that the DEA had an interest in  
10:22AM 16 Mr. Gerace.

10:22AM 17 Q. As a result of your conversation with your boss, Jim  
10:22AM 18 Jancewicz, what, if anything, did you -- did you learn, or  
10:23AM 19 what did you expect?

10:23AM 20 A. Jim Jancewicz basically told me, and the one thing I do  
10:23AM 21 recall from that conversation between me and Jim is that he  
10:23AM 22 said that -- I guess this is a quote from Dale, but our guy,  
10:23AM 23 meaning --

10:23AM 24 **MR. SINGER:** Objection, hearsay.

10:23AM 25 **THE COURT:** Hang on.

1           **MR. COOPER:** Judge, I believe this is being offered  
2 for the effect -- well, I know it's being offered for the  
3 effect on the listener.

4           The question was as a result of the conversation that  
5 you had, what did you expect in order to explain his actions.

6           **THE COURT:** Hang on. Yeah, overruled.

7           **BY MR. COOPER:**

8 Q. You can answer the question?

9 A. Can you ask the question again?

10 Q. Absolutely.

11 As a result of the conversation that you had with your  
12 boss, Jim Jancewicz, what did you expect to happen?

13 A. Jim indicated that --

14           **THE COURT:** No, no. He said: What did you expect to  
15 happen? Not what he said to you.

16           **THE WITNESS:** Okay.

17           **THE COURT:** But what did you expect to happen.

18           **THE WITNESS:** Got it, Your Honor.

19 I expected to receive a call from -- from DEA.

20           **BY MR. COOPER:**

21 Q. Okay. Did you know who you were gonna receive a call  
22 from at DEA?

23 A. I probably did.

24 Q. Do you have a recollection --

25 A. Well, I --

10:24AM

1 Q. -- of that --

10:24AM

2 A. -- know now that it was Agent Bongiovanni, because he

10:24AM

3 called me. But Jim probably told me at the time that it was

10:24AM

4 Agent Bongiovanni that would be calling me.

10:24AM

5 Q. Okay.

10:24AM

6 A. That wasn't what it was said, but --

10:24AM

7 Q. Based on your experience as a special agent with the FBI,

10:24AM

8 was that common to have that kind of interagency

10:24AM

9 communication from agency to agency, putting different

10:24AM

10 agencies in touch with each other?

10:24AM

11 A. I wouldn't say it was uncommon.

10:24AM

12 Q. Okay. Did you ultimately receive a call from Special

10:24AM

13 Agent Bongiovanni?

10:24AM

14 A. I did.

10:24AM

15 Q. Before you received that phone call, was he a person that

10:24AM

16 you knew and had worked with before?

10:24AM

17 A. I did not know him well. I remember the first time I

10:25AM

18 ever saw him was he was at -- not the main FBI office, but I

10:25AM

19 was at an off site for the FBI Safe Streets Task Force, and

10:25AM

20 he was over there one day. I certainly had seen him maybe in

10:25AM

21 your office, maybe in and around the courthouse.

10:25AM

22 And we actually made an arrest together at one time on an

10:25AM

23 FBI case. And I believe that arrest, it was the

10:25AM

24 7th/10th Street initial gang roundup, so he would have been

10:25AM

25 part of my arrest team. And I think that was prior to our

10:25AM 1 meeting.

10:25AM 2 Q. So fair to say he wasn't a total stranger to you?

10:25AM 3 A. He wasn't a total stranger, no, but we weren't -- we

10:25AM 4 still -- I didn't -- we didn't know each other well.

10:25AM 5 Q. Okay. Can you describe the phone call that you had with

10:25AM 6 Special Agent Bongiovanni?

10:25AM 7 A. Very cordial phone call. He called me, introduced

10:25AM 8 himself. And basically indicated that he wanted to have a

10:26AM 9 meeting between me and him and Peter Gerace.

10:26AM 10 Q. Did it surprise you that Bongiovanni wanted Peter Gerace

10:26AM 11 to be present for that meeting?

10:26AM 12 A. I thought it was a little unusual that Mr. Gerace would

10:26AM 13 be there.

10:26AM 14 Q. Was there any explanation offered as to why Special Agent

10:26AM 15 Bongiovanni was calling you on behalf of Peter Gerace?

10:26AM 16 A. No.

10:26AM 17 Q. Did you form a belief, based on your conversation with

10:26AM 18 Special Agent Bongiovanni, as to why he was calling you on

10:26AM 19 behalf of Peter Gerace?

10:26AM 20 A. Yeah. I --

10:26AM 21 **MR. SINGER:** Objection, speculation.

10:26AM 22 **THE COURT:** Yeah.

10:26AM 23 **MR. SINGER:** Speculation, Judge.

10:26AM 24 **MR. COOPER:** Judge, I'd like to approach to argue

10:26AM 25 that.

10:26AM 1 **THE COURT:** I want to think about it for a second.

10:26AM 2 Okay, why don't you come up.

10:26AM 3 (Sidebar discussion held on the record.)

10:27AM 4 **THE COURT:** So tell me what the problem -- so, he's  
10:27AM 5 asking him what he thought. Why is that a problem?

10:27AM 6 **MR. SINGER:** So he's asking him, you know, based on  
10:27AM 7 this, what seems like a very short conversation, what he  
10:27AM 8 thought the purpose of --

10:27AM 9 **THE COURT:** Yeah.

10:27AM 10 **MR. SINGER:** -- the meeting was.

10:27AM 11 **THE COURT:** Yes.

10:27AM 12 **MR. SINGER:** But I don't think there's any foundation  
10:27AM 13 that's been laid right now to suggest that he has any facts to  
10:27AM 14 draw that type of conclusion.

10:27AM 15 **THE COURT:** Then why can't you cross-examine on that.

10:27AM 16 **MR. SINGER:** I mean, I can certainly cross-examine,  
10:27AM 17 but I think the other part of it, too, is that he's basing  
10:27AM 18 some of that on, you know, conversation that he had with his  
10:27AM 19 supervisor, you know, that -- it's a hearsay comment.

10:27AM 20 **THE COURT:** So what?

10:27AM 21 **MR. SINGER:** I think I see your point, Judge. I  
10:27AM 22 mean, but I guess I'll renew my objection.

10:27AM 23 **THE COURT:** Okay. That's fine.

10:27AM 24 The objection is overruled.

10:27AM 25 **MR. COOPER:** Thank you, Judge.



10:27AM 1 (End of sidebar discussion.)

10:27AM 2 **BY MR. COOPER:**

10:28AM 3 Q. I'm going to ask you the question again, Special Agent  
10:28AM 4 Herbst. Did you form a belief, based on your conversation  
10:28AM 5 with Special Agent Bongiovanni, as to why he was calling you  
10:28AM 6 on behalf of Peter Gerace?

10:28AM 7 A. I did.

10:28AM 8 Q. What was that belief?

10:28AM 9 A. That Mr. Gerace was an informant for the DEA.

10:28AM 10 Q. During that phone call with Special Agent Bongiovanni,  
10:28AM 11 did you discuss whether you were going to bring anyone with  
10:28AM 12 you for that meeting with Peter Gerace?

10:28AM 13 A. Well, there were a number of phone calls to set up a  
10:28AM 14 meeting. And I think the main stumbling block was Mr. Gerace  
10:28AM 15 at the time was ill. I think it was the swine flu that was  
10:28AM 16 going around at that time, so he was ill. So I wasn't in any  
10:28AM 17 hurry to meet with Mr. Gerace.

10:29AM 18 But, so, there was -- it took a -- it took a -- it took  
10:29AM 19 time to actually find a particular date. But, I think the  
10:29AM 20 answer to your question is, I had intended to bring my  
10:29AM 21 partner with me, who would have been Detective Robert  
10:29AM 22 Cottrell from the Amherst Police Department, but  
10:29AM 23 Mr. Bongiovanni made it pretty clear that he did not want  
10:29AM 24 anybody else at the meeting.

10:29AM 25 Q. Okay. So I'm going to ask you to listen carefully to the

10:29AM 1 question that I ask you, and just answer specifically what  
10:29AM 2 I'm asking you, okay?

10:29AM 3 Did there come a point in your conversation with him, one  
10:29AM 4 of your conversations with Bongiovanni, where he discussed  
10:29AM 5 whether you were going to bring anyone with you to the  
10:29AM 6 meeting?

10:29AM 7 A. Yes.

10:29AM 8 Q. Okay. Did you intend to bring someone with you to the  
10:29AM 9 meeting?

10:29AM 10 A. Yes.

10:29AM 11 Q. Who did you intend to bring with you to the meeting?

10:29AM 12 A. Detective Robert Cottrell.

10:29AM 13 Q. Okay. Did Special Agent Bongiovanni respond when you  
10:29AM 14 told him you wanted to bring Bob Cottrell to the meeting?

10:29AM 15 A. Yes.

10:29AM 16 Q. How did he respond?

10:29AM 17 A. He did not want anybody else at the meeting.

10:29AM 18 Q. Did that strike you as odd?

10:29AM 19 A. Well, it kind of put me in a bad position, because this  
10:30AM 20 is a guy that I work with every day, and so I had to kind of  
10:30AM 21 find a way to close him out of this meeting. So, it kind of  
10:30AM 22 made me uncomfortable.

10:30AM 23 Q. Did you ultimately agree to attend the meeting without  
10:30AM 24 Special -- or, without your partner, Bob Cottrell?

10:30AM 25 A. I did.

10:30AM 1 Q. Is this all -- in terms of a time frame, is this all  
10:30AM 2 occurring within several weeks after that search at  
10:30AM 3 Pharaoh's?

10:30AM 4 A. Yes.

10:30AM 5 Q. Okay. At some point, did you participate in a meeting  
10:30AM 6 with someone from the U.S. Attorney's Office regarding Peter  
10:30AM 7 Gerace?

10:30AM 8 A. Yes.

10:30AM 9 Q. Who did you meet with?

10:30AM 10 A. Tony Bruce.

10:30AM 11 Q. Okay. And did you have any intention to build a case  
10:30AM 12 into Gerace at that point when you met with Tony Bruce?

10:30AM 13 A. Yes. I had information that Mr. Gerace was involved in  
10:30AM 14 narcotics trafficking, as we discussed earlier. I wanted to  
10:30AM 15 develop a case on Mr. Gerace so I would have leverage on him  
10:31AM 16 so that he would cooperate in my bigger case.

10:31AM 17 Q. Did you make Tony Bruce aware of your investigation into  
10:31AM 18 Peter Gerace and the facts that you had learned?

10:31AM 19 A. I did.

10:31AM 20 Q. Did Tony Bruce from the U.S. Attorney's Office agree to  
10:31AM 21 pursue a case against Peter Gerace for drugs?

10:31AM 22 A. Yes, Tony Bruce indicated that he would prosecute that  
10:31AM 23 case, meaning that he would prosecute Peter Gerace based on  
10:31AM 24 the facts that I presented to him.

10:31AM 25 Q. You described for us a few minutes ago the fact that you

1 set up a meeting with Bongiovanni and Peter Gerace, but that  
2 that took some time. Did that meeting ultimately occur?

3 A. It did.

4 Q. Where did the meeting occur?

5 A. I initially went to the DEA office, which was located in  
6 the Electric Tower. And I went up to the main DEA office,  
7 and met with Agent Bongiovanni.

8 And then the two of us went down to the mezzanine level.  
9 So there's a lobby, and there's a level above that where you  
10 can kind of oversee the activity in the lobby, so we went up  
11 to that level.

12 And then ultimately Mr. Gerace came up there. I think  
13 there was a phone call between -- I don't know if Gerace  
14 called Bongiovanni, or Bongiovanni called Gerace, but  
15 ultimately there was, like, this is where we are, meet us  
16 here.

17 Q. Would -- is it fair to say that you had a portion of time  
18 with Bongiovanni before Gerace arrived?

19 A. Yeah, I did. But it was a, you know, it was -- it  
20 wasn't -- it wasn't a lot of time. There was nothing  
21 substantive really.

22 Q. Okay. Once Gerace arrived, did the three of you meet?

23 A. We did.

24 Q. Where did you meet?

25 A. At the -- on the mezzanine level of the Electric Tower.

1 Q. Describe that meeting. What happened?

2 A. There really was no substantive to the meeting at all.

3 And again, going back, I wasn't really sure why Mr. Gerace

4 was there, because I had already met him. And it was a very

5 informal meeting, a very casual meeting. It wasn't -- I'm

6 not sure what the word is, but it was kind of a -- three of

7 us getting together to talk. But we didn't talk about

8 anything of substance.

9 Q. Did Gerace provide you with information about ongoing

10 criminal activity?

11 A. He did not.

12 Q. Did he tell you, I know about kilo-level cocaine

13 traffickers?

14 A. He did not.

15 Q. What was the impression of that meeting that you had at

16 the time?

17 A. I just thought it was a little odd because, again,

18 there's nothing substantive, you know, discussed at the

19 meeting, or nothing substantive came of that meeting.

20 Q. Did there come a time where Gerace left, and you and

21 Bongiovanni remained together on that mezzanine level?

22 A. Yes.

23 Q. Did you have a further conversation with Bongiovanni at

24 that time?

25 A. I did.

1 Q. Can you tell the jury how that conversation went?

2 A. I -- again, I certainly don't recall everything that

3 happened that long ago, but I do remember specifically that

4 we were -- we would have been talking about Mr. Gerace, and I

5 indicated that -- to Mr. Gerace -- or, I'm sorry, I indicated

6 to Agent Bongiovanni that Mr. Gerace had issues with

7 probation. And he was kind of dismissive of that.

8 And then I further went on to say, well, I -- or, the

9 FBI, has a drug case on Mr. Gerace. And he was kind of

10 dismissive of that initially, indicating that it wasn't a

11 very good drug case.

12 And -- do you want me to continue? Or do you want to ask

13 a question.

14 Q. So you mentioned that you told him you had a drug case

15 into Peter Gerace, and that Bongiovanni told you it wasn't a

16 very good drug case. Did you bring up your conversation with

17 Tony Bruce?

18 A. I did. I told him at that time that Tony Bruce had

19 already committed to prosecution of Peter Gerace.

20 Q. Did Bongiovanni react to that?

21 A. Yeah. He kind of changed completely. And I think, as we

22 were discussing earlier, I think I told you it was kind of an

23 oh -- I said, oh, poop. But I didn't tell you "oh, poop,"

24 but I said something else.

25 But it was that kind of a moment. I could see that --

1 once I told him that Tony Bruce, who was a senior prosecutor  
2 in the United States Attorney's Office, so he serves in the  
3 same position that you and Mr. Tripi serve in, once I --

4 And Tony was a longtime organized crime prosecutor. And  
5 I believe he even started in the Strike Force, which was  
6 started in Kennedy Administration. Well, it started under  
7 Bobby Kennedy, who was the attorney general. But --

8 So at one time, I believe that Tony Bruce was  
9 specifically focused on Organized Crime. But he had a  
10 reputation in the community as a federal prosecutor, and  
11 particularly a federal prosecutor that was interested in  
12 Organized Crime.

13 Q. During that conversation you had with Bongiovanni after  
14 Gerace has left, did Bongiovanni say anything to you about  
15 how he knew Gerace?

16 A. Yeah, he did. He indicated -- well, I got the  
17 impression, and I'm sure he indicated that they were longtime  
18 family friends, and then he indicated that he was a good kid.

19 Q. Did you leave that meeting believing that Gerace was  
20 Bongiovanni's source?

21 A. Yes.

22 Q. Why?

23 A. What else would he be?

24 Q. Well, could he --

25 A. He wasn't a subject of any investigation, and so you're

1 either a subject of an investigation or you're cooperating.  
2 You're one or the other. So, he might have never  
3 specifically told me that he was his source.

4 But, again, I was a senior FBI agent. He, assuming he  
5 was a senior DEA agent, you know, we didn't -- he never had  
6 to tell me he was his source. I knew he was his source.

7 Q. After that meeting, did you continue your investigation  
8 into Peter Gerace?

9 A. I'm sure a period of time passed, but just to be clear, I  
10 never closed the investigation. But in deference to DEA, I  
11 didn't pursue that avenue of the investigation.

12 Q. Okay. So you said "in deference to DEA." What was the  
13 deference about?

14 A. The DEA -- the DEA supervisor had called the FBI  
15 supervisor, and then I met with Agent Bongiovanni, and they  
16 were expressing an interest in this case. So it's like, all  
17 right, I can -- I can continue to make my case, I can go out  
18 and find other people. You know, they -- they have an  
19 interest in Mr. Gerace that might be greater than the  
20 interest that I had in him.

21 Q. Did your meeting with Bongiovanni on that day deter you  
22 from continuing to work into Peter Gerace and the drug case?

23 A. Yeah. I know I thought about it for a while, and I  
24 stewed about it for a while, but I ultimately decided not to  
25 pursue Mr. Gerace.



10:38AM 1 **MR. COOPER:** Okay. I'd ask that we publish what's  
10:38AM 2 already in evidence as Government Exhibit 30A.  
10:38AM 3 **BY MR. COOPER:**  
10:38AM 4 Q. You should see on your screen in a moment here, Special  
10:38AM 5 Agent Herbst, Government Exhibit 30A. Are you drawing on it?  
10:38AM 6 A. No, I'm trying to blow it up.  
10:38AM 7 Q. Okay.  
10:38AM 8 A. You showed it to me before.  
10:38AM 9 Q. We can do that. Hold on. How do we erase that?  
10:38AM 10 **MR. COOPER:** Okay. Thank you.  
10:38AM 11 **THE WITNESS:** I didn't mean to draw on it.  
10:38AM 12 **MR. COOPER:** That's okay.  
10:38AM 13 **BY MR. COOPER:**  
10:39AM 14 Q. Special Agent Herbst, before today, did you ever see this  
10:39AM 15 document?  
10:39AM 16 A. Before I testified today, you showed me this document in  
10:39AM 17 the witness room.  
10:39AM 18 Q. Okay. And before today, like, before you woke up this  
10:39AM 19 morning, had you ever seen --  
10:39AM 20 A. No.  
10:39AM 21 Q. -- this before?  
10:39AM 22 A. I have not.  
10:39AM 23 Q. Okay. Do you know what this document is generally?  
10:39AM 24 A. It's a -- it's called a DEA-6. So it would be a -- in  
10:39AM 25 the FBI, we call them FBI 302s. So it's basically where they

1 report the results of their investigation or interviews.

2 **MR. COOPER:** And, Ms. Champoux, can we zoom in on box  
3 number 5 at the top left? Thank you.

4 **BY MR. COOPER:**

5 Q. Can you see who this DEA-6 is drafted by?

6 A. Yes, SA, meaning special agent, Joseph Bongiovanni.

7 **MR. COOPER:** Okay. And you can zoom out,  
8 Ms. Champoux. And can you move forward now to paragraph 4 on  
9 page 2?

10 **THE CLERK:** Let me check the monitors for the jury.

11 **MR. COOPER:** Sure.

12 **THE COURT:** And juror number 10, if you're having a  
13 tough time seeing that monitor, you can move up to look.

14 **MR. COOPER:** May I continue?

15 **THE COURT:** You may.

16 **MR. COOPER:** Thank you, Judge.

17 **BY MR. COOPER:**

18 Q. Special Agent Herbst, we zoomed in on paragraph 4 of  
19 Government Exhibit 30A. Can you see that?

20 A. I can.

21 Q. Can you read the second sentence for the jury?

22 A. Starting with Gerace?

23 Q. Correct.

24 A. Gerace stated that he would not offer additional  
25 information until he received a good-faith commitment from

1 USPO, United States Probation Officer Lepiane, that he would  
2 receive consideration on his violation in lieu of information  
3 he is willing to provide.

4 Q. Okay. Now can we read the second sentence up at the top  
5 here, starting Gerace stated that?

6 A. Oh. If I read the wrong sentence, an apologize.

7 Q. That's okay.

8 A. Gerace stated that he knew significant cocaine  
9 traffickers capable of moving kilo quantities of cocaine out  
10 of various distribution houses located in the North Buffalo  
11 and South Buffalo areas.

12 Q. During your meeting with Bongiovanni and Gerace, did  
13 Gerace offer you information about significant cocaine  
14 traffickers?

15 A. No.

16 Q. Did he talk to you about kilos of cocaine?

17 A. No.

18 **MR. COOPER:** You can take that down, Ms. Champoux.  
19 Thank you.

20 **BY MR. COOPER:**

21 Q. Was any of the information contained in that report ever  
22 conveyed to you?

23 A. No.

24 Q. Did Special Agent Bongiovanni tell you during your phone  
25 call, this guy knows about kilo coke dealers?

10:42AM 1 A. No.

10:42AM 2 Q. I just want to circle back for one moment about your

10:42AM 3 conversation with Bongiovanni on the mezzanine after Gerace

10:42AM 4 has left. Did you provide Bongiovanni with some of the

10:42AM 5 specific details about your drug case into Gerace?

10:42AM 6 A. I'm sure I did.

10:42AM 7 **MR. COOPER:** Okay. I have no further questions,

10:42AM 8 Judge.

10:42AM 9 **THE COURT:** Cross?

10:42AM 10

10:42AM 11 **CROSS-EXAMINATION BY MR. SINGER:**

10:42AM 12 Q. Good morning, Mr. Herbst.

10:42AM 13 A. Good morning.

10:42AM 14 Q. So how long have you been retired from the FBI?

10:43AM 15 A. I retired in 2013, so ten years. More than that.

10:43AM 16 Q. Are you retired officially at this point, or do you still  
10:43AM 17 work?

10:43AM 18 A. I'm retired officially.

10:43AM 19 Q. Okay. I'm assuming the last time you took a look at any  
10:43AM 20 of your files was in 2013 when you retired?

10:43AM 21 A. Yes.

10:43AM 22 Q. Okay.

10:43AM 23 A. Unless it was shown to me, I -- I came back to Buffalo

10:43AM 24 this past September because I think that was a possible trial

10:43AM 25 date. So at that time, I sat down with Agent Burns and

1 reviewed my Jencks, so there were some documents in there.

2 But other than that, I haven't seen my substantive files

3 prior to the time I retired.

4 Q. Okay. And you're aware of the fact that the FBI tried to

5 perform a search to find files related to the 2009

6 interactions you had with U.S. Probation Officer Lepiane

7 regarding Peter Gerace?

8 A. I'm not aware of that, no.

9 Q. And are you aware that FBI also performed a search to try

10 to find files that you may have generated with regard to

11 meeting with Joseph Bongiovanni and Peter Gerace in 2009?

12 A. I'm not aware of that.

13 Q. So you're not aware of any analyst looking for any type

14 of paper you may have written on this?

15 A. I don't doubt that was done, but I'm not aware of it.

16 Q. Okay. Do you recall writing any reports or FBI 302s on

17 any of the meetings you had with either Lepiane --

18 A. I wouldn't have written a 302, because 302 was

19 testimonial.

20 I did see in my Jencks material that I reviewed in

21 September, I did see a memo that I authored about

22 communications between me and Peter Lepiane.

23 Q. Correct. So --

24 **MR. SINGER:** Is it -- are the screens set to the

25 jury, or are they just to the witness?

10:44AM 1 **THE CLERK:** There's no screen set. Do you need --

10:45AM 2 **MR. SINGER:** Yes, if we could just set it for the  
10:45AM 3 witness at this point in time.

10:45AM 4 **THE CLERK:** Okay.

10:45AM 5 **MR. SINGER:** Ms. Champoux, will you mind bringing up  
10:45AM 6 Government Exhibit 3502A, please.

10:45AM 7 **BY MR. SINGER:**

10:45AM 8 Q. Do you see that document, Mr. Herbst?

10:45AM 9 A. Can you blow it up for me, please?

10:45AM 10 Q. So is this the document that you just referred to as one  
10:45AM 11 of the things that you reviewed?

10:45AM 12 A. Yeah, I haven't read the whole thing, but that appears to  
10:45AM 13 be a document that I referred to.

10:45AM 14 **MR. SINGER:** And you can take this down.

10:45AM 15 **BY MR. SINGER:**

10:45AM 16 Q. So this would have been one of the pieces of paper you  
10:45AM 17 generated regarding your meetings?

10:45AM 18 A. Yes.

10:45AM 19 Q. Okay. So this isn't a FBI 302, this is a different type  
10:45AM 20 of form the FBI uses?

10:45AM 21 A. Yeah, I think it's an EC, so an FBI 302 would  
10:45AM 22 generally -- it would be information that would become  
10:45AM 23 testimonial, so this would be more administrative  
10:46AM 24 information.

10:46AM 25 Q. Okay. And so if you can explain to the jury briefly,

1 what's the difference between an administrative entry versus  
2 a testimonial entry?

3 **MR. COOPER:** Judge, I object to the relevance of  
4 this.

5 **THE COURT:** Overruled.

6 **THE WITNESS:** Test -- you know, going back to the  
7 302, a testimonial would be information that you would  
8 document that you would believe might have to be testified to.

9 So it's like when you interview a witness, if you go  
10 to a bank robbery, and you interview the teller or the other  
11 people in the bank, you know, you take notes on that, and then  
12 you -- back in the day you dictated it, but after a while you  
13 typed it, and those would be testimonial.

14 **BY MR. SINGER:**

15 Q. Okay. So that would be the 302?

16 A. That would be the 302, yes.

17 Q. And then the administrative notes, what are those?

18 A. If you're going to document something administratively,  
19 there's -- I was in the FBI for a long time, so it changed,  
20 but you would document it -- towards the end, it would be  
21 documented EC, which stood for electronic communication,  
22 because everything became electronic.

23 Q. Okay. And, so, by documenting these things, it's a way  
24 for you to help recall what happened during the various  
25 meetings that you had going on?

10:47AM 1 A. Yes. Yes.

10:47AM 2 Q. And it's something that you used to refresh your memory  
10:47AM 3 on anything that's going on many years ago, correct?

10:47AM 4 A. Sure.

10:47AM 5 Q. So, I just showed you a copy of an electronic  
10:47AM 6 communication entry, administrative entry that you made  
10:47AM 7 regarding your meetings with Peter Lepiane back in August of  
10:47AM 8 2009, correct?

10:47AM 9 A. Yeah, I think it was -- I thought was September, but yes.

10:47AM 10 Q. I can show it to you again.

10:47AM 11 A. No, the date on the upper -- the date of the --

10:47AM 12 Q. Sure, let me hand you a copy of --

10:47AM 13 A. Okay.

10:47AM 14 Q. -- 3502A. And just take a look at that, see if it  
10:47AM 15 refreshes your memory, and when you're ready, look up at me.

10:47AM 16 A. Yeah, it's dated.

10:48AM 17 Q. I just don't want you to read the information, because we  
10:48AM 18 wouldn't be doing it properly. But does that refresh your  
10:48AM 19 recollection as to the conversations you had with  
10:48AM 20 Mr. Lepiane?

10:48AM 21 A. Yes.

10:48AM 22 Q. Okay. So let me take that away from you.

10:48AM 23 So, now that you've had a chance to take a look at that,  
10:48AM 24 when do you recall that you made the entry regarding your  
10:48AM 25 communication with Mr. Lepiane?



1 A. That communication was dated September 4th, 2009.

2 Q. Correct. And the communication that's documented in  
3 there, does that occur in August of 2009?

4 A. That, again, I didn't read it, but it probably -- it  
5 would have been documenting information that obviously  
6 occurred on that date or prior to that date. Yes.

7 Q. Now, and I know this is many, many, many years ago, so,  
8 this is one way that we can help refresh your memory, okay?

9 A. All right.

10 Q. All right. So you mentioned that when you got to the  
11 Buffalo office, you were initially assigned to intelligence,  
12 but then you moved to Squad 4; is that right?

13 A. Yes.

14 Q. And Squad 4, that was part of your -- I guess one of the  
15 things that Squad 4 does was the Safe Streets Task Force; is  
16 that right?

17 A. Yes.

18 Q. So Safe Streets Task Force, you mentioned it was  
19 something that was related to gang or Organized Crime  
20 prosecutions, investigations?

21 A. Safe Streets Task Force would not be Organized Crime, it  
22 would be specifically targeted towards gang. Organized Crime  
23 would have been a separate violation.

24 And again, we had -- primarily we had two squads. We had  
25 a white collar squad, and a squad that did everything else.

10:49AM 1 So we did Organized Crime as well as Safe Streets Task Force.

10:49AM 2 Q. Okay. So as far as the Organized Crime aspect, that's

10:49AM 3 the reason you would have inherited this file regarding the

10:49AM 4 old unsolved murders you talked about on direct?

10:49AM 5 A. I didn't inherit it, I initiated it.

10:49AM 6 Q. Okay. So you initiated it?

10:49AM 7 A. Yes.

10:49AM 8 Q. All right. So you initiated that, so it wasn't an

10:49AM 9 inherited file. You took proactive steps to open up new

10:49AM 10 investigation into these cold cases?

10:49AM 11 A. That's correct.

10:49AM 12 Q. Okay. And I know we talked about the Safe Streets Task

10:49AM 13 Force that you were on, you had a partner that was assigned

10:50AM 14 to you, you mentioned Bob Cottrell?

10:50AM 15 A. I did.

10:50AM 16 Q. And he worked for the Amherst Police Department?

10:50AM 17 A. He did. But he was -- any task force officer on the FBI

10:50AM 18 is also deputized. I'm not sure that's the correct word, but

10:50AM 19 they have -- they're deputized as federal agents. So they

10:50AM 20 have the same powers that I would have as a FBI Special

10:50AM 21 Agent. They actually more powers, because they have state

10:50AM 22 powers, state police powers.

10:50AM 23 Q. Okay. And he's somebody that helps assist you in your

10:50AM 24 investigations that you're running through the FBI on

10:50AM 25 Squad 4?

10:50AM 1 A. Yes.

10:50AM 2 Q. So, on the organized crime aspect of things, I realize  
10:50AM 3 that was one thing in addition to the gang investigations you  
10:50AM 4 talked about on direct. But you also mentioned that you  
10:50AM 5 investigated countless other crimes inside of the -- in  
10:50AM 6 Squad 4?

10:50AM 7 A. Yeah. I -- Squad 4 did. But I primarily did the  
10:50AM 8 Organized Crime and the Safe Streets. We had other agents  
10:51AM 9 who did the bank robberies. I don't remember any kidnappings  
10:51AM 10 there, but, you know, if a kidnapping would come up, then  
10:51AM 11 everybody would work it.

10:51AM 12 Q. Understand. So part of your days in Squad 4, given the  
10:51AM 13 Safe Streets Task Force duties that you had, you'd  
10:51AM 14 investigate drugs, correct?

10:51AM 15 A. Yes.

10:51AM 16 Q. So you conduct narcotics investigations into various  
10:51AM 17 gangs that may have been operating within the city --

10:51AM 18 A. Yes.

10:51AM 19 Q. -- around the area?

10:51AM 20 A. Yes.

10:51AM 21 Q. And then you'd also investigate potentially crimes  
10:51AM 22 involving guns, correct?

10:51AM 23 A. Yes.

10:51AM 24 Q. And, so -- so you talked about how you initiate this one  
10:51AM 25 file into Organized Crime. And I'm assuming that you opened

10:51AM 1 it because you believed that Organized Crime may still exist  
10:51AM 2 inside of Buffalo?

10:51AM 3 A. Yes.

10:51AM 4 Q. So you're familiar with, and you testified earlier on  
10:51AM 5 direct about, some of the names. So you were familiar with  
10:51AM 6 Joseph Todaro Sr.?

10:51AM 7 A. Yes.

10:51AM 8 Q. And he was someone that you still believed was associated  
10:52AM 9 with Italian Organized Crime?

10:52AM 10 A. Yes.

10:52AM 11 Q. And you mentioned another person, Joseph Todaro Jr.?

10:52AM 12 A. Yes.

10:52AM 13 Q. And he was someone who you still believed may be  
10:52AM 14 associated with Italian Organized Crime?

10:52AM 15 A. Yes.

10:52AM 16 Q. And were you aware that he was connected to a business in  
10:52AM 17 Buffalo?

10:52AM 18 A. Yes.

10:52AM 19 Q. And what business was that?

10:52AM 20 A. LaNova Pizza.

10:52AM 21 Q. Okay. And, so, one of the things that piqued your  
10:52AM 22 interest with regard to Peter Gerace was the fact that he was  
10:52AM 23 relative to both Todaro Sr. and Todaro Jr.?

10:52AM 24 A. Well, the -- yes. I mean, initially, information I  
10:52AM 25 developed was that he was involved in narcotics trafficking,

1 but I thought that he could help us in this investigation.

2 I just want to go back one second if I can, if that's all  
3 right with you.

4 But just the -- we're talking about cold case homicides  
5 that had occurred, you know, back -- I think the last one  
6 occurred in the mid '80s, so that's kind of -- it's a cold  
7 case, so it's not, you know, I'm on not talking about  
8 Organized Crime in the 2009 time period, I'm talking about  
9 Organized Crime back in the '80s.

10 Q. Okay. But your belief, as you testified on direct, is  
11 that potentially if you could develop a source who may have  
12 connections to some of the people who might have been  
13 involved in something like a murder back then, that could  
14 help you resurrect this cold case?

15 A. Yes, that's correct.

16 Q. Okay. So, in 2009, Detective Cottrell, he's working with  
17 you, and he raises information to your attention with regard  
18 to Peter Gerace. That's how you first found out about the  
19 narcotics trafficking that was happening at Pharaoh's  
20 Gentlemen's Club?

21 A. Well, actually, I had a lot of different sources of  
22 information. But I think you're referring to a FBI 302 --  
23 well, an FBI 302, but I -- the Amherst Police Department did  
24 a car stop, and there were two individuals in that car stop  
25 that provided information on Peter Gerace. I think that's

1 what you're referring to.

2 Q. Correct.

3 A. I'm not sure that Detective Cottrell provided me that  
4 information. I think I knew -- I think I became aware of  
5 that initially from the FBI agent that initially -- that  
6 authored that FBI 302.

7 And I think another Amherst police officer might have  
8 also been involved in that 302.

9 Q. Okay. So they brought information to your attention  
10 about this traffic stop which led to information regarding  
11 Peter Gerace?

12 A. Yes.

13 Q. Okay. And that's what caused you to contact Officer  
14 Lepiane at the probation office, correct?

15 A. I don't think that's correct. I think I was already in  
16 contact with Peter Lepiane about somebody else that was a  
17 longtime member of Italian Organized Crime that was also on  
18 probation at that time.

19 Q. Okay. But when you started to look into things further  
20 with regard to Peter Gerace, you learned that there was  
21 potential distribution of cocaine occurring at Pharaoh's  
22 Gentlemen's Club, correct?

23 A. Yes.

24 Q. And the confidential sources that you were getting  
25 information from, they were talking about this to your fellow

1 task force officers?

2 A. I don't know about fellow task force officers, but I -- I  
3 remember there was multiple sources of information other than  
4 the car stop you're talking about. I do remember that there  
5 was a, I think it's called an FD 71, but it was an FBI form  
6 that documented complaint information. So, as a regular part  
7 of our duties, you know, if somebody walks into an FBI office  
8 or somebody called into the FBI office, we would talk to them  
9 and they would provide information.

10 But there was an FD 71, if that's the correct form, that  
11 was very specific and very detailed, but I believe was  
12 anonymous, into Mr. Gerace's narcotics activities.

13 But it was so detailed, that it had -- how can I say  
14 it -- an indicia of credibility.

15 Q. Okay. And so you learned about there was cocaine  
16 trafficking that could be traced back to Peter Gerace,  
17 correct?

18 A. Yes.

19 Q. Okay.

20 A. Narcotics traffic. I'm not -- I'm not sure if it was  
21 specific to cocaine.

22 Q. Okay. But it's narcotics trafficking, and that's one of  
23 the crimes that you investigate in Squad 4?

24 A. Yes.

25 Q. Okay. Did you learn about any type of prostitution

10:56AM 1 activities that may have been occurring at Pharaoh's

10:56AM 2 Gentlemen's Club as well?

10:56AM 3 A. I did not.

10:56AM 4 Q. Okay. And the distribution of narcotics, that's a  
10:56AM 5 federal offense?

10:56AM 6 A. Yes.

10:56AM 7 Q. So, you know who Peter Gerace is, I think we've  
10:56AM 8 established that, correct?

10:56AM 9 A. Yes, we did.

10:56AM 10 Q. And you know that he's related in some way to the  
10:56AM 11 Todaros, correct?

10:56AM 12 A. That's correct.

10:56AM 13 Q. And so one of the motivations for why you want to open up  
10:56AM 14 a case on Peter Gerace is that you potentially could use him  
10:57AM 15 after he's charged as a source, correct?

10:57AM 16 A. Yes. Well -- or, before he's charged.

10:57AM 17 Q. Correct. And you want to flip him, right?

10:57AM 18 A. Sure.

10:57AM 19 Q. And that potentially could open up this cold case  
10:57AM 20 investigation that you want to get going?

10:57AM 21 A. Yes.

10:57AM 22 Q. So that's one of the reasons why you started to  
10:57AM 23 coordinate with Officer Lepiane from the probation office  
10:57AM 24 regarding surveillance at Pharaoh's?

10:57AM 25 A. I don't recall any surveillance at Pharaoh's other than



1 the fact that, at the time, we had a Cheektowaga Police  
2 Officer John Wanat was assigned to the Safe Streets Task  
3 Force, and I did ask John on a number of occasions to go out  
4 to Pharaoh's on, I think, Saturday morning to establish that  
5 Mr. Gerace was actually residing there. In other words, he  
6 spent the night there.

7 Q. Correct.

8 A. And then he followed him to the bank and did different  
9 things. But when you say surveillance, it's -- I don't think  
10 I ever told Lepiane to do a surveillance.

11 Q. All right. But you understood that the probation office  
12 was doing their surveillance to establish that he had in some  
13 way a connection to Pharaoh's Gentlemen's Club, right?

14 A. It sounds like surveillance, like a physical  
15 surveillance? Like people following them? I don't think  
16 probation does that. Maybe they do, I don't know.

17 Q. I'm talking about people looking to see if Peter Gerace  
18 was coming in or out of Pharaoh's Gentlemen's Club.

19 A. Yeah, I don't know if probation did that or not.

20 Q. Okay. So you're not aware of those efforts?

21 A. I'm not aware of that.

22 Q. But you --

23 A. If that happened, I might have been aware of it back  
24 then, but I'm not aware of it now.

25 Q. But you do recall at least talking to one of your task

10:58AM 1 force officers, or it was a Cheektowaga police officer, to  
10:58AM 2 help establish this connection that Peter Gerace had to  
10:58AM 3 Pharaoh's Gentlemen's Club?

10:58AM 4 A. Yeah, I don't know if it was -- I don't know if it was in  
10:58AM 5 conjunction with probation, but I do have an independent  
10:58AM 6 recollection of asking John Wanat to go out there and to see  
10:58AM 7 if Mr. Gerace had spent the night there. And then to do any  
10:58AM 8 follow-up surveillance.

10:59AM 9 Q. Okay. His whole purpose was to establish a way for  
10:59AM 10 probation to conduct their search, correct?

10:59AM 11 A. Yes.

10:59AM 12 Q. And that would give you access to not just Pharaoh's  
10:59AM 13 Gentlemen's Club, but also to a sit down with Peter Gerace,  
10:59AM 14 correct?

10:59AM 15 A. Yes.

10:59AM 16 Q. And so that all culminates in the October 31st, 2009,  
10:59AM 17 search that you participated in with the probation office,  
10:59AM 18 correct?

10:59AM 19 A. Yes.

10:59AM 20 Q. All right. So, you talked about the conversation you had  
10:59AM 21 with Peter Gerace that morning, correct?

10:59AM 22 A. I did.

10:59AM 23 Q. And there wasn't much substance to that conversation,  
10:59AM 24 right?

10:59AM 25 A. There was not.

10:59AM 1 Q. So he didn't say to you anything about, hey, I know about  
10:59AM 2 all these murders that I want to talk to you about?

10:59AM 3 A. No, and I didn't ask him specifically about that either.

10:59AM 4 Q. Okay. So you didn't ask him specific questions about  
10:59AM 5 illegal activities?

10:59AM 6 A. I don't think I did. I think it was more of a building  
10:59AM 7 rapport with him. Having a conversation with him.

10:59AM 8 I think the only thing I recall specifically asking him  
10:59AM 9 about is maybe documents that were on his desk, that type of  
11:00AM 10 thing.

11:00AM 11 Q. Okay. But the main focus of what you were doing that  
11:00AM 12 morning was not to investigate specific acts of crime, but  
11:00AM 13 more so to build a rapport with Peter Gerace so that  
11:00AM 14 potentially you could speak to him in the future about crimes  
11:00AM 15 you wanted to solve?

11:00AM 16 A. That's correct.

11:00AM 17 Q. Okay. So, two, three days later, you recall that you get  
11:00AM 18 a call from your supervisory Special Agent Jim Jancewicz?

11:00AM 19 A. It wasn't -- it wasn't a call. He -- he got a call from  
11:00AM 20 Dale Kasprzyk, the DEA supervisor. Jim Jancewicz was my FBI  
11:00AM 21 supervisor. So after he got off the call, and actually,  
11:00AM 22 where Jim and I sat in the office, I could kind of -- well, I  
11:00AM 23 certainly knew Jim was on the phone, and I want to say I kind  
11:00AM 24 of heard my name, so I wasn't surprised when he came to see  
11:00AM 25 me afterwards.

11:00AM 1 **THE COURT:** Mr. Singer, we've been at this for about  
11:01AM 2 an hour and a half. Is this a convenient time for a break?

11:01AM 3 **MR. SINGER:** I don't want to hold anyone up from a  
11:01AM 4 break, Judge, so I can stop.

11:01AM 5 **THE COURT:** Okay. Okay. So let's take our morning  
11:01AM 6 break. Please remember my instructions about not talking to  
11:01AM 7 anyone about this, including each other, not making up your  
11:01AM 8 mind. We'll see you back here in about ten minutes.

11:01AM 9 (Jury excused at 11:01 a.m..)

11:01AM 10 **THE COURT:** Okay. First of all, in the interest of  
11:02AM 11 complete transparency, and this is gonna happen a number of  
11:02AM 12 times during the course of this trial, I have known Mr. Herbst  
11:02AM 13 for 50-some years. We used to play softball together in  
11:02AM 14 Canada. He can probably tell you some stories about me that I  
11:02AM 15 would rather you not hear. But just, as I say, I haven't seen  
11:02AM 16 him in probably 50 years, but I've known him for 58.

11:02AM 17 **MR. COOPER:** Can Rob cross him about that, or no?

11:02AM 18 **THE COURT:** Yeah. So I just want people to know  
11:02AM 19 that. And as I say, I'm sure it's going happen a number of  
11:02AM 20 times. I did not realize that this was the same Herbst that I  
11:02AM 21 knew from Canada, I knew his whole family, but one of the  
11:02AM 22 Herbsts that I knew from Canada until last Friday, actually,  
11:02AM 23 when Judge McCarthy told me that, because Judge McCarthy knows  
11:02AM 24 him as well. But I did not know that until then. And I just  
11:02AM 25 wanted to let you know.

11:02AM 1 **MR. SINGER:** That's fine, Judge. There are two Brian  
11:02AM 2 Burns, there could be multiple Herbsts.

11:03AM 3 **THE COURT:** As I say, I'm sure -- I'm sure there are  
11:03AM 4 going to be several people who I know who are going to  
11:03AM 5 testify, and obviously it doesn't make any difference to me,  
11:03AM 6 but I just want to be completely transparent with everyone.

11:03AM 7 **MR. COOPER:** Thank you, Judge.

11:03AM 8 **THE COURT:** Okay. Anything we need to put on the  
11:03AM 9 record?

11:03AM 10 **MR. COOPER:** Just that I'd asked the witness to be  
11:03AM 11 excused during the break in case he needs to use the restroom,  
11:03AM 12 and I'll tell him that we can't talk to him about the  
11:03AM 13 substance of his testimony on cross.

11:03AM 14 **THE COURT:** Great. Anything else, Mr. Singer?

11:03AM 15 **MR. SINGER:** No.

11:03AM 16 **THE COURT:** Great. Thanks, everybody.

11:03AM 17 (Off the record.)

11:03AM 18 (Back on the record.)

11:14AM 19 (Jury not present.)

11:14AM 20 **THE CLERK:** All rise.

11:14AM 21 **THE COURT:** Please be seated.

11:14AM 22 **THE CLERK:** We are back on the record for the  
11:14AM 23 continuation of the jury trial in case number 19-cr-227,  
11:14AM 24 United States of America versus Joseph Bongiovanni.

11:14AM 25 All counsel and parties are present.

11:14AM 1           **THE COURT:** Okay. Anything we need to put on the  
11:14AM 2 record before we continue?

11:14AM 3           **MR. COOPER:** Nothing from the government, Judge.

11:14AM 4           **MR. SINGER:** No, Your Honor.

11:14AM 5           **THE COURT:** Okay. Let's bring them back, please,  
11:14AM 6 Pat.

11:16AM 7           (Jury seated at 11:16 a.m.)

11:16AM 8           **THE COURT:** The record will reflect that all our  
11:16AM 9 jurors, again, are present.

11:16AM 10          I mind the witness that he's still under oath.

11:16AM 11          And you may continue, Mr. Singer.

11:16AM 12          **MR. SINGER:** Thank you.

11:16AM 13          **BY MR. SINGER:**

11:16AM 14 Q. All right. So let's get back to it.

11:16AM 15          So we left off before the break, we were talking about  
11:16AM 16 how your supervisor, Special Agent Jancewicz, had not called  
11:16AM 17 you, but at least yelled over to you, hey, you know, come on  
11:16AM 18 over and speak to me, Herbst, I got some call from the DEA;  
11:17AM 19 is that right?

11:17AM 20 A. Yeah, he actually -- he approached me. He came up to --  
11:17AM 21 towards where I sat, and we had a face-to-face conversation.

11:17AM 22 Q. Okay. And Jimmy, as you called him, said, you know, DEA,  
11:17AM 23 I may have some interest in Peter Gerace, so I'd like you to  
11:17AM 24 coordinate a meeting with him, someone's gonna reach out to  
11:17AM 25 you?

11:17AM 1 A. Yeah, again, I don't remember exactly obviously what he  
11:17AM 2 said. But he did indicate that I would be getting a call,  
11:17AM 3 and I don't know if he said it would be Agent Bongiovanni,  
11:17AM 4 but I would be getting a call from the DEA.

11:17AM 5 Q. And then eventually you do get a call from Agent  
11:17AM 6 Bongiovanni, correct?

11:17AM 7 A. I do, yes.

11:17AM 8 Q. And he talked to you about getting this meeting  
11:17AM 9 coordinated, correct?

11:17AM 10 A. That's correct.

11:17AM 11 Q. And you testified earlier that the meeting took a little  
11:17AM 12 bit of time to coordinate because Peter Gerace at that time  
11:17AM 13 had the flu or some type of illness?

11:17AM 14 A. That's correct.

11:17AM 15 Q. Okay. So it didn't happen right off the bat, it took  
11:18AM 16 some period of time to get the meeting established?

11:18AM 17 A. It did.

11:18AM 18 Q. And during that coordination call that you had with  
11:18AM 19 Mr. Bongiovanni, I think you testified that he had indicated  
11:18AM 20 to you to not bring your partner, Detective Cottrell, to the  
11:18AM 21 meeting?

11:18AM 22 A. I don't know if it was during that initial call, but  
11:18AM 23 there was, you know, several calls between Agent Bongiovanni  
11:18AM 24 and myself trying to, you know, I think there were a lot of  
11:18AM 25 starts and stops, you know, like, we might have scheduled a

1 meeting and then maybe Mr. Gerace couldn't make the meeting  
2 or whatever. So it was during, you know, one conversation, I  
3 don't know if it was during that initial call or not.

4 Q. Did he indicate to you that it was Gerace's preference to  
5 just meet with someone one on one?

6 A. You know, I was only communicating obviously with Agent  
7 Bongiovanni, so I couldn't answer that question.

8 Q. Okay. So you don't know the answer to that?

9 A. I don't know that.

10 Q. So, eventually you get this meeting scheduled. Do you  
11 remember it being scheduled for November 23rd, 2009?

12 A. I don't recall the date. But I -- I don't -- if that's  
13 the date, that's the date.

14 Q. Okay. So you had this meeting over in the DEA  
15 headquarters building, which is the Electric Tower at the  
16 time?

17 A. Yes.

18 Q. And you first meet with Special Agent Bongiovanni in the,  
19 I guess, the entrance of the building?

20 A. Yeah, I went up to -- I don't recall what floor they were  
21 on. I had been to the DEA before once or twice, but -- so  
22 whatever floor they were on, I went up there. And I don't  
23 even recall, there's probably some protocol to get in there.  
24 But in any event, Agent Bongiovanni came and met me.

25 Q. Okay. And Peter Gerace wasn't there at the beginning



11:19AM 1 when you met Special Agent Bongiovanni in the building,  
11:19AM 2 correct?  
11:19AM 3 A. He was not.  
11:19AM 4 Q. He was coming a little bit later?  
11:19AM 5 A. Yes.  
11:19AM 6 Q. So I think you said that Bongiovanni took you on a tour  
11:19AM 7 or something like that of the building?  
11:19AM 8 A. He had offered to give me a tour of the DEA office, but I  
11:19AM 9 had already been there. And I do recall having a  
11:20AM 10 conversation with him about had I been to this building, it  
11:20AM 11 was kind of a cool building, so we had a conversation like  
11:20AM 12 that.  
11:20AM 13 Q. Okay. And then eventually --  
11:20AM 14 A. We went down in the mezzanine level.  
11:20AM 15 Q. Right. And then eventually someone receives a call from  
11:20AM 16 Peter Gerace; is that right?  
11:20AM 17 A. Yes.  
11:20AM 18 Q. And then Gerace, I presume, assumingly, communicates the  
11:20AM 19 fact that he's coming, correct?  
11:20AM 20 A. Yeah. I think it was more like I'm here, where are you,  
11:20AM 21 that kind of thing.  
11:20AM 22 Q. Okay. So eventually, you, Mr. Bongiovanni, and Peter  
11:20AM 23 Gerace sit --  
11:20AM 24 A. Yes.  
11:20AM 25 Q. -- down --

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1 A. Yes.

2 Q. -- to talk?

3 A. Yes.

4 Q. And the conversation that you had, I know you didn't take

5 notes of it, but approximately how long did it last?

6 A. Less than a half hour.

7 Q. Okay. And fair to say that it's somewhat similar to the

8 conversation that you had with him in Pharaoh's a couple

9 weeks before?

10 A. It wasn't a substantive conversation, so if that's what

11 you're looking for.

12 Q. Yeah, I guess, there wasn't substance that came out of

13 the conversation, correct?

14 A. That's correct.

15 Q. And you had an opportunity to take a look at the DEA-6

16 that Agent Bongiovanni wrote about this meeting, right?

17 A. I did.

18 Q. And you saw that one paragraph, in paragraph 4, where it

19 talked about how Mr. Gerace wanted some type of assurance

20 about what would happen to him on his probation violation

21 before he would be willing to give information?

22 A. I did see that.

23 Q. Did you offer him any type of assurance about what would

24 happen with his probation violation at that meeting?

25 A. Did I offer Mr. Gerace?

11:21AM 1 Q. Correct.

11:21AM 2 A. No, I wouldn't have any authority to offer that.

11:21AM 3 Q. Okay. So you didn't tell him, hey, Mr. Gerace, you know,  
11:21AM 4 we're gonna do whatever we can to help you out on this  
11:21AM 5 probation violation?

11:21AM 6 A. First of all, I don't recall that ever coming up. But as  
11:21AM 7 an FBI agent, I wouldn't have any authority to tell probation  
11:21AM 8 department what to do with their violation.

11:21AM 9 Q. Okay. So you didn't offer him any type of assurance --

11:21AM 10 A. I --

11:21AM 11 Q. -- on his --

11:21AM 12 A. -- did --

11:21AM 13 Q. -- probation?

11:21AM 14 A. -- not.

11:22AM 15 Q. Sorry?

11:22AM 16 A. No.

11:22AM 17 Q. Okay. And, you know, I think at the end of the meeting,  
11:22AM 18 you had concluded that you didn't believe that he had  
11:22AM 19 information that was useful for you?

11:22AM 20 A. There was -- there was no information of substance  
11:22AM 21 discussed at the meeting.

11:22AM 22 Q. Okay. So none of the information that he talked about in  
11:22AM 23 that meeting was useful for you, correct?

11:22AM 24 A. I guess that's correct.

11:22AM 25 Q. Okay. And you'd been doing this a long time at that

11:22AM 1 point, right?

11:22AM 2 A. I had.

11:22AM 3 Q. Probably 20 years plus?

11:22AM 4 A. Yes.

11:22AM 5 Q. And how long was your FBI career again?

11:22AM 6 A. I retired in my 28th year.

11:22AM 7 Q. Okay. So I'm sure you'd been to meetings where someone

11:22AM 8 says, hey, I want to cooperate. And then when it comes down

11:22AM 9 to it, they don't really provide anything to you?

11:22AM 10 A. That's true.

11:22AM 11 Q. And after this meeting that you had, you made a call to

11:23AM 12 Officer Lepiane about what happened, correct?

11:23AM 13 A. I'm sure during that time period, I was communicating

11:23AM 14 just like I had been communicating with Agent Bongiovanni

11:23AM 15 about coordinating the meeting, I'm sure I was talking to

11:23AM 16 Peter Lepiane about what was going on, too.

11:23AM 17 Q. If Mr. Lepiane took some notes about a telephone call you

11:23AM 18 had with him, would that help refresh your memory as to what

11:23AM 19 conversations you may have had with him after the meeting?

11:23AM 20 A. Would Mr. Lepiane's notes refresh my recollection?

11:23AM 21 Q. Yes.

11:23AM 22 A. No, I don't think so. I'd be happy to look at them,

11:23AM 23 but --

11:23AM 24 Q. Let's give it a shot.

11:23AM 25 **MR. COOPER:** Well --

2                   **MR. COOPER:**  -- Judge, the answer the witness said  
3 was, no, I don't think they would refresh my recollection.

4                   **THE COURT:** But he doesn't know, Mr. Cooper, so he  
5   can look at them.

7 BY MR. SINGER:

8 Q. So I'm going to hand you a copy of something that's  
9 marked as 3501B?

10 A. Can you do me a favor? Can you put it up and blow it up  
11 so I can see it easier?

12                   **MR. SINGER:** Ms. Champoux, can you put 3501B onto the  
13 witness's screen.

14                   **THE COURT:** Just for the witness, please.

15                   **MR. SINGER:** And it's going to be on the last page of  
16 the exhibit, page 6 of 7. And it if you can blow up the entry  
17 on 11/23. Actually, the one on top. I'm sorry.

18 BY MR. SINGER:

19 Q. So Mr. Herbst, can you please take a look at that. Don't  
20 repeat anything on the page, but when you're done, look at  
21 me.

22	A. Okay.
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23 | Q. Are you all set?

24	A. I am.
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25                   **MR. SINGER:** Okay. Ms. Champoux, can you put that

11:25AM 1 down, please?

11:25AM 2 **BY MR. SINGER:**

11:25AM 3 Q. Did that help refresh your memory about the call you had  
11:25AM 4 with Mr. Lepiane, sir?

11:25AM 5 A. To me, the substance of that paragraph appears to be a  
11:25AM 6 meeting between Peter Gerace and Mr. Lepiane and it's  
11:25AM 7 discussing terms of his supervision. There was a reference  
11:25AM 8 to a call that I made to him, but the substance of the  
11:25AM 9 paragraph doesn't seem to relate to my business at all.

11:25AM 10 Q. So I guess what I'm getting at is did that help refresh  
11:26AM 11 your memory, I know it was only two or three sentences, about  
11:26AM 12 the call that you had with him, but did --

11:26AM 13 A. I don't -- I don't -- I don't --

11:26AM 14 Q. -- that refresh your memory --

11:26AM 15 A. -- I don't doubt that I had a call based on that.

11:26AM 16 Q. Okay.

11:26AM 17 A. But the paragraph I just read doesn't seem to -- it  
11:26AM 18 seemed to be --

11:26AM 19 **THE COURT:** But here's the question. Does that  
11:26AM 20 refresh your memory about the telephone call?

11:26AM 21 **THE WITNESS:** No.

11:26AM 22 **BY MR. SINGER:**

11:26AM 23 Q. Okay. So, you walk away with this -- from this meeting  
11:26AM 24 with Gerace and Bongiovanni with the impression, I think you  
11:26AM 25 said the assumption, that DEA was interested in using Peter

11:26AM 1 Gerace as a confidential informant, correct?

11:26AM 2 A. Yes.

11:26AM 3 Q. But Agent Bongiovanni never communicated that to you  
11:26AM 4 directly, correct?

11:26AM 5 A. He did not. He never used the word. He never -- he  
11:26AM 6 never told me directly that Mr. Gerace was a source for him  
11:26AM 7 or DEA, that's correct.

11:26AM 8 Q. And as far as, I guess, your meeting, you talked earlier  
11:26AM 9 about meeting with AUSA Anthony Bruce?

11:27AM 10 A. Yes.

11:27AM 11 Q. And you talked about he was somebody who had dealings in  
11:27AM 12 the past with prosecutions of Italian Organized Crime  
11:27AM 13 figures?

11:27AM 14 A. Yes.

11:27AM 15 Q. And one of the reasons why you'd met with him in this  
11:27AM 16 case is that, you know, if you're gonna meet with a  
11:27AM 17 prosecutor in the office, he was the guy who would have  
11:27AM 18 potential interest in this case, right?

11:27AM 19 A. No, that's not correct. Actually my meeting with Tony  
11:27AM 20 Bruce was in the context of the followup of the search that  
11:27AM 21 probation did.

11:27AM 22 So probation and myself, maybe Detective Cottrell, post  
11:27AM 23 the Pharaoh's search, we met with Tony Bruce. And I think  
11:27AM 24 that was probation protocol that following, just like if I  
11:27AM 25 did a search, I would go to a magistrate and do the return.

1 I think that's their protocol, they go to the U.S. Attorney's  
2 Office. I've been on a few probation searches, and that's  
3 what happened is after that we would meet with them.

4 So, it was in that context that we were meeting with AUSA  
5 Bruce. And he just -- it just happened to be that, you know,  
6 he was an experienced prosecutor, number 1, and an  
7 experienced Organized Crime prosecutor, but it's not like I  
8 sought him out.

9 Q. Okay.

10 A. I wish I had, but I didn't.

11 Q. Okay. But you mentioned this case regarding Gerace that  
12 you believe you had, correct?

13 A. Can you ask -- say the question again?

14 Q. Certainly. So you mentioned to AUSA Bruce the  
15 investigation into Peter Gerace?

16 A. Yes.

17 Q. And you mentioned to him about the fact that you had two  
18 confidential informants at that time that were talking about  
19 the dealing of narcotics in Pharaoh's Gentlemen's Club?

20 A. I don't remember the specific conversation I had with  
21 AUSA Bruce, but I would have -- I think it was more in the  
22 context of the car stop that the Amherst Police Department  
23 had made. I believe that was the substance of it.

24 And it was based on that, that Tony Bruce made a  
25 representation that he would prosecute based on that.



1 Q. Okay. Well, I'm assuming that AUSA Bruce wouldn't choose  
2 to prosecute a case against Peter Gerace just based on  
3 something that someone did in Amherst, right?

4 **MR. COOPER:** Objection, Judge. Calls for speculation  
5 as to what AUSA Bruce would do.

6 **THE COURT:** Yeah, sustained.

7 You can ask on this topic, but rephrase the question,  
8 please.

9 **BY MR. SINGER:**

10 Q. So when you sat down with AUSA Bruce, Mr. Herbst, you  
11 talked some facts about the investigation into Peter Gerace,  
12 correct?

13 A. Yes.

14 Q. And you mentioned the fact that there were narcotics  
15 involved in your investigation that tied back to Peter  
16 Gerace, correct?

17 A. Yes.

18 Q. And you also talked about how Peter Gerace potentially  
19 was distributing these narcotics, correct?

20 A. I'm not sure about that. But I don't remember the  
21 details, I just remember talking to him that we had  
22 information that Mr. Gerace was involved in narcotics  
23 trafficking, probably specifically talked about the Amherst  
24 car stop.

25 And then it was at that point that Mr. Gerace indicated

11:29AM 1 that he would prosecute that case.

11:30AM 2 Q. And when Mr. Gerace -- you're referring to Mr. Bruce.

11:30AM 3 Mr. Bruce indicated to you that he was --

11:30AM 4 A. Yes.

11:30AM 5 Q. -- eventually going to prosecute that case?

11:30AM 6 A. Yes.

11:30AM 7 Q. Okay. So, you walk away from the meeting on the 23rd of

11:30AM 8 November with the impression that DEA wanted to use Peter

11:30AM 9 Gerace as an informant, correct?

11:30AM 10 A. That meeting with Agent Bongiovanni.

11:30AM 11 Q. Correct.

11:30AM 12 A. Yes.

11:30AM 13 Q. And so since it was your impression that they were going

11:30AM 14 take over the case that you were starting to build against

11:30AM 15 him, you didn't transfer your files to the DEA, did you?

11:30AM 16 A. Well, they weren't building a case on Mr. Gerace. They

11:30AM 17 were building a case -- they were using Mr. Gerace to build

11:30AM 18 another case. My case was on Mr. Gerace.

11:30AM 19 Q. Okay. So when did you follow up with DEA after this

11:30AM 20 meeting about the progress of the cooperation?

11:30AM 21 A. I don't recall.

11:30AM 22 Q. You don't recall making a call to the DEA, or you didn't

11:30AM 23 make a call to the DEA?

11:30AM 24 A. I'm sure there was calls between Agent Bongiovanni and

11:31AM 25 myself post our initial meeting. But at some point, I

1 decided not to pursue the Gerace angle, and again, my larger  
2 case was into these uninvolved homicides. And, so,  
3 Mr. Gerace was just one avenue that I was pursuing. And so  
4 believing that he had a more significant interest in  
5 Mr. Gerace, I decided not to pursue my investigation.  
6 Not -- not -- not the larger investigation, but just the  
7 investigation into Mr. Gerace.

8 Q. So you just testified that you had electronic  
9 communications with Agent Bongiovanni after this meeting on  
10 November 23rd, 2009, correct?

11 A. I'm sure I did, yes.

12 Q. Okay. I know you said you're sure you did, but you  
13 testified to that.

14 A. I did.

15 Q. Where's the documentation on this, sir?

16 A. You know, this was, again, it was a -- it was a short  
17 administrative matter. And, again, I haven't seen my files  
18 since -- well, I retired in 2013. But -- and you're telling  
19 me that there was a search done for documents, you know, I  
20 did see some documents back in September of this year, but,  
21 you know --

22 Q. Okay. But the simple fact is, is that there's no  
23 electronic communication that you documented talking about  
24 any subsequent conversations with Agent Bongiovanni, correct?

25 A. I think that's correct. I haven't seen it if it exists.

11:32AM 1 Q. So you can't definitively state to this jury today that  
11:32AM 2 you had any conversations with him, right?

11:32AM 3 A. That's correct.

11:33AM 4 **MR. SINGER:** One moment, Judge.

11:33AM 5 Thank you, Agent Herbst. I have no further  
11:33AM 6 questions.

11:33AM 7 **THE WITNESS:** Thank you, sir.

11:33AM 8 **THE COURT:** Redirect, Mr. Cooper?

11:33AM 9 **MR. COOPER:** Just briefly, Judge. Thank you.

11:33AM 10

11:33AM 11 **REDIRECT EXAMINATION BY MR. COOPER:**

11:34AM 12 Q. Special Agent Herbst, you were asked some questions on  
11:34AM 13 cross-examination about whether Bongiovanni told you directly  
11:34AM 14 that Gerace was a source of his; do you remember being asked  
11:34AM 15 that question?

11:34AM 16 A. Yes.

11:34AM 17 Q. If he didn't tell you directly, what led you to believe  
11:34AM 18 that Gerace was a source of his?

11:34AM 19 A. Well, he didn't have to tell me. You're either -- the  
11:34AM 20 DEA calls the FBI, so a DEA supervisor calls my supervisor.  
11:34AM 21 My supervisor tells me you're gonna have a meeting with DEA.  
11:34AM 22 So either he's a subject of their investigation, or he's  
11:34AM 23 cooperating in their investigation.

11:34AM 24 You don't have to -- you don't have to -- first of all,  
11:34AM 25 you don't -- if -- the nature of a source is you don't tell

1 people he's a source, that kind of defeats the purpose of  
2 being a source, right? It's a confidentiality thing. So I  
3 was an experienced agent, Agent Bongiovanni was an  
4 experienced agent. He didn't have to tell me, I knew.

5 Q. Okay. And the fact that Gerace was present for the  
6 meeting, did that weigh into your analysis of whether he was  
7 a subject of a DEA investigation?

8 A. He certainly wasn't a subject, no.

9 Q. Was it common to bring subjects in for an interview to  
10 discuss the case?

11 A. Not -- not -- not in that context. It's certainly common  
12 to interview subjects and to have proffer agreements and that  
13 kind of stuff, but --

14 Q. Was that the sort of meeting you had with --

15 A. No.

16 Q. -- Gerace --

17 A. No.

18 Q. -- and Bongiovanni?

19 A. No. No. No.

20 Q. Okay. Are you familiar with the phrase double-dealing?

21 A. Yes.

22 Q. Okay. And have you, in the context of your lengthy  
23 career as an FBI Special Agent, are you familiar with the  
24 handling of informants or sources of information?

25 A. Yes.

1 Q. Okay. Can you tell the members of the jury, what does  
2 double-dealing refer to in the context of a contact or a  
3 source?

4 **MR. SINGER:** Objection. Judge, can we approach?

5 **THE COURT:** Yeah, come on up.

6 (Sidebar discussion held on the record.)

7 **MR. SINGER:** Concern over relevance, Judge. I don't  
8 really understand where we're going here.

9 **THE COURT:** It's beyond the scope, no?

10 **MR. COOPER:** No, it's not beyond the scope, and it is  
11 relevant, Judge. The reason, it's the same line of  
12 questioning that I was pursuing, why did Special Agent Herbst  
13 take the action that he took, which was to back off and walk  
14 away from Gerace.

15 I expect that his testimony on this topic is going to  
16 be that his understanding, as a special agent, is that if you  
17 have an informant, that's your informant; and they're  
18 double-dealing, meaning they're committing crimes while  
19 they're working for you as an informant; it's your job as the  
20 handling agent to address that.

21 That weighed into his decision. I anticipate he will  
22 testify that weighed into his decision to let Bongiovanni  
23 handle his own source --

24 **THE COURT:** Why is the term "double-dealing"  
25 relevant?

11:36AM 1 **MR. COOPER:** Well, it's just the term that's used.

11:36AM 2 **THE COURT:** Yeah.

11:36AM 3 **MR. COOPER:** I can just ask him about when an  
11:37AM 4 informant commits crimes, I'm trying to get there, I'm not  
11:37AM 5 trying to --

11:37AM 6 **THE COURT:** No, no, no, and I'm not suggesting that  
11:37AM 7 you are. But I think that's what confused me, it is what  
11:37AM 8 confused me, and perhaps is what triggered Mr. Singer's  
11:37AM 9 objection.

11:37AM 10 **MR. COOPER:** I think if he had let him answer the  
11:37AM 11 question, it would have explained it.

11:37AM 12 **THE COURT:** Well, I understand that.

11:37AM 13 **MR. COOPER:** Okay.

11:37AM 14 **THE COURT:** But neither one of us -- that's not how  
11:37AM 15 it works.

11:37AM 16 **MR. COOPER:** Okay. Should I re-ask the same  
11:37AM 17 question, I guess is my point?

11:37AM 18 **THE COURT:** I think you should withdraw the question  
11:37AM 19 and ask it a different way.

11:37AM 20 **MR. COOPER:** Because --

11:37AM 21 **THE COURT:** You can do it however you want.

11:37AM 22 **MR. COOPER:** Okay.

11:37AM 23 **THE COURT:** I'm just telling you I don't think that  
11:37AM 24 the term "double-dealing" is a term that is particularly  
11:37AM 25 relevant. I think the concept is relevant, and I think you

1 can ask about the concept.

2 **MR. COOPER:** Okay.

3 **THE COURT:** So I would prefer you to do it that way.

4 **MR. COOPER:** Understood.

5 **THE COURT:** But if you don't want to do it that way,  
6 the -- and if Mr. Singer objects again, I may sustain it.  
7 But, you know, do it however you want.

8 **MR. COOPER:** Understood, Judge.

9 (End of sidebar discussion.)

10 **BY MR. COOPER:**

11 Q. I will withdraw that question, and rephrase it.

12 Have you handled an informant before during your career  
13 as a FBI Special Agent?

14 A. Many times.

15 Q. Okay. And as the agent responsible for handling an  
16 informant, are you responsible for addressing a situation  
17 where your informant is committing other criminal activity,  
18 not what he's supposed to be doing?

19 A. Yes. There's an attorney general guidelines that would  
20 apply to the FBI and other agencies under the Department of  
21 Justice. And it's very clear that you do not operate  
22 criminal informants that are conducting criminal activity  
23 without -- there's -- it happened a long time ago, but  
24 without the authority of the Department of Justice,  
25 basically.



1 Q. Okay. So if you were handling an informant and you found  
2 out that your informant was committing other criminal  
3 activity, would you, as the handling agent, be responsible  
4 for dealing with that situation?

5 A. Yes.

6 Q. Okay. Is it fair to say that responsibility wouldn't go  
7 to some other agency if it was your informant?

8 A. If it's my FBI informant, and he's involved in criminal  
9 activity, then I would have to address it, yes.

10 Q. Okay. And so you've testified on cross-examination that  
11 you ultimately chose to stop pursuing the drug investigation  
12 into Peter Gerace; is that correct?

13 A. Yes, that's correct.

14 Q. Okay. Did you believe at that time that Gerace was  
15 Bongiovanni's informant?

16 A. I did.

17 Q. In your mind at that time, whose job did you think it was  
18 to address Gerace's criminal activity?

19 A. Well, Agent Bongiovanni.

20 Q. Why?

21 A. Because that's the way it's done.

22 Q. Okay. Next I want to ask you, on cross-examination you  
23 were asked some questions about the last time that you looked  
24 at your files; do you remember that?

25 A. Yes.

11:39AM 1 Q. You were asked questions about what's in your files; do  
11:39AM 2 you remember that?

11:39AM 3 A. Yes.

11:39AM 4 Q. What year did you retire?

11:39AM 5 A. August of 2013.

11:39AM 6 Q. After you retired, did you bring a box home full of  
11:40AM 7 reports and put it in your basement?

11:40AM 8 A. No.

11:40AM 9 **MR. SINGER:** Objection.

11:40AM 10 **THE COURT:** Overruled.

11:40AM 11 **BY MR. COOPER:**

11:40AM 12 Q. Did you bring a box home full of your reports and files  
11:40AM 13 and put it in your basement?

11:40AM 14 A. No.

11:40AM 15 Q. Why not?

11:40AM 16 A. Well, they're not -- they're not my files, they're the  
11:40AM 17 FBI's files.

11:40AM 18 **MR. COOPER:** Thank you.

11:40AM 19 I have nothing further, Judge.

11:40AM 20

11:40AM 21 **RECROSS-EXAMINATION BY MR. SINGER:**

11:40AM 22 Q. So, Mr. Herbst, you talked on redirect about how  
11:40AM 23 Mr. Gerace's presence at this meeting between you and  
11:40AM 24 Bongiovanni was something that was not common, correct?

11:40AM 25 A. That's correct.

11:40AM 1 Q. So, in other words, if an agent was calling you up to  
11:40AM 2 basically tell you that I'm gonna use this person as a  
11:40AM 3 confidential informant, the presence of the informant is not  
11:40AM 4 necessary, right?

11:40AM 5 A. That's correct. Unless we were going to do something  
11:40AM 6 operationally together, then that would be a situation where  
11:40AM 7 they would introduce the source to the FBI.

11:41AM 8 Q. Correct. So -- so the purpose of bringing someone to the  
11:41AM 9 meeting would make an introduction to you, right?

11:41AM 10 A. Yes. Yeah.

11:41AM 11 Q. Okay. And you say that you stopped pursuing this case  
11:41AM 12 based on your assumption that Mr. Gerace was a source,  
11:41AM 13 correct?

11:41AM 14 A. Yes.

11:41AM 15 Q. But you never --

11:41AM 16 A. Well, based that -- based to the fact that he was a  
11:41AM 17 source, that my interest in him was to cooperate on the  
11:41AM 18 larger investigation that I had other avenues I could pursue  
11:41AM 19 to perfect my case, and that I believe that, you know, based  
11:41AM 20 on the fact the DEA called the FBI, that he might have -- his  
11:41AM 21 inference -- his -- he might have been more significant to --  
11:41AM 22 to the DEA than he was to the FBI.

11:41AM 23 Q. But you weren't on the call that Agent Jancewicz received  
11:41AM 24 from G.S. Kasprzyk, correct?

11:41AM 25 A. I was not.

1 Q. So you don't know what was communicated from Kasprzyk to  
2 Jancewicz, correct?

3 A. No, I'm sure that Jimmy would have said something to me,  
4 but I don't -- other than what I've already testified to on  
5 direct, and maybe on cross, you know, what I recall from that  
6 is that I would be getting a call from the DEA. I don't know  
7 if it was specific Agent Bongiovanni, but I would be getting  
8 a call to -- from the DEA, and that we should work it out.

9 Q. All right. And, again, Mr. Bongiovanni never indicated  
10 to you that Peter Gerace was his confidential informant,  
11 correct?

12 A. He did not.

13 **MR. SINGER:** Thank you.

14 **MR. COOPER:** Nothing further, Judge. Thank you.

15 **THE COURT:** Okay. You can step down, sir, thank you.

16 **THE WITNESS:** Thank you.

17 (Witness excused at 11:42 a.m.)

18 (Excerpt concluded at 11:42 a.m.)

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**CERTIFICATE OF REPORTER**

In accordance with 28, U.S.C., 753(b), I  
certify that these original notes are a true and correct  
record of proceedings in the United States District Court for  
the Western District of New York on February 20, 2024.

s/ Ann M. Sawyer

Ann M. Sawyer, FCRR, RPR, CRR

Official Court Reporter

U.S.D.C., W.D.N.Y.

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